IN THE SUPREME COURT OF MISSOURI

No. 83870

EDDIE BAUER, INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Appeal from the Administrative Hearing Commission,
Honorable Sharon Busch, Commissioner

RESPONDENT'S BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
No. 45631

Office of the Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102-0899
573-751-3321

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JURISDICTIONAL STATEMENT

In its jurisdictional statement, appellant Eddie Bauer, Inc., asserts that this appeal from the Administrative Hearing Commission presents the question whether it "is a 'taxpayer.'" Appellant's Brief (App. Br.) at 7. That would be a simple question to answer – Eddie Bauer timely filed Missouri income tax returns and paid Missouri income taxes, thus making it "a taxpayer." But here, Eddie Bauer has sought relief not as a separate taxpayer, but as a part of a group of companies owned by Spiegel, Inc. The "amended return" listed as the taxpayer not the original taxpayer and appellant, Eddie Bauer, Inc., but a group identified as "Spiegel, Inc., Eddie Bauer, Inc., and Combined Affiliates." R. 47-190.

That clarification, however, does not affect this court's jurisdiction; the question, however posed, still requires the construction of revenue laws, and thus falls within this court's jurisdiction under Mo. Const., Art. V. § 3.

STATEMENT OF FACTS

The Director adopts the statement of facts set forth by appellant Eddie Bauer, Inc., It is important, however, to clarify the relationships among the entities involved in this appeal.

This case involves taxes paid for tax years 1995, 1996, and 1997. The taxes at issue were paid by Eddie Bauer, Inc., an affiliate of Spiegel, Inc. R. 44. The returns did not list Spiegel or any other Spiegel affiliate as a taxpayer.

After this Court decided *General Motors Corp. v. Director of Revenue*, 981 S.W. 2d 561 (Mo. banc 1998), someone filed consolidated corporate tax returns for "Spiegel, Inc., Eddie Bauer, Inc., and Combined Affiliates" ("Spiegel Group"). R. 47-190. In essence, Spiegel Group sought to withdraw the 1995-97 returns for and payments made by Eddie Bauer, and replace them with a group return – and a lower payment.

The Director of Revenue denied that attempt. R. 45, 190-97. The Administrative Hearing Commission affirmed that decision. R. 454.

POINTS RELIED ON

I.

The Administrative Hearing Commission did not err in denying Eddie Bauer's refund claim because the decision was authorized by law and supported by competent and substantial evidence in that under § 143.631 Spiegel, Inc. and its affiliates, including Eddie Bauer, had a constitutionally adequate pre-deprivation remedy for challenging the constitutionality of § 143.413.3(1). [Responds to Point I of Appellant's Brief.]

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)

Hewitt Well Drilling & Pump Service, Inc. v. Director of Revenue, 847 S.W.2d 797, 797 (Mo. banc 1993)

Kraft General Foods, Inc. v. Iowa Dept. of Revenue, 505 U.S. 71 (1992)

Section 143.631, RSMo 2000

Section 143.751(1), RSMo 2000

II.

The Administrative Hearing Commission did not err in denying Eddie Bauer's claims for refund because that decision is authorized by law and supported by competent evidence in the record in that in § 143.801.1, Missouri provided appellant an adequate post-deprivation remedy. [Responds to portions of Points II and IV and to Point III of Appellant's Brief.]

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)

Section 143.801.1, RSMo 2000

III.

The Administrative Hearing Commission did not err in denying Eddie Bauer's claims for refund because that decision is authorized by law and supported by competent evidence in the record in that Missouri did not withdraw any post-deprivation remedy. [Responds to Point II of Appellant's Brief.]

Reich v. Collins, 513 U.S. 106 (1994)

Section 143.801.1, RSMo 2000

Section 143.631.1, RSMo 2000

IV.

The Administrative Hearing Commission did not err in denying Eddie Bauer's claims for refund because that decision is authorized by law and supported by competent evidence in the record in that if appellant had no adequate remedy at law, it was entitled to sue for declaratory and injunctive relief prior to paying the taxes in dispute. [Responds to a portion of Point II of Appellant's Brief.]

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)

Associated Indus. of Mo. v. Director of Revenue, 857 S.W. 2d 182 (Mo. banc 1993)

Buck v. Legett, 813 S.W. 2d 872, 875 (Mo. banc 1991)

V.

The Administrative Hearing Commission did not err in denying Eddie Bauer's claim for refund for 1995 because that claim was not timely under § 143.801.1 in that it was filed more than three years after the original return. [Responds to a portion of Point V of Appellant's Brief.]

Hamacher v. Director of Revenue, 779 S.W. 2d 565 (Mo. banc 1989)

Section 143.801.1, RSMo 2000

26 U.S.C. § 6513

ARGUMENT

Standard of Review

This is an appeal from a decision by the Missouri Administrative Hearing Commission (AHC). The AHC's decisions are upheld when authorized by law and supported by competent and substantial evidence upon the record as a whole, and when they are not clearly contrary to the reasonable expectations of the General Assembly. *See Becker Elec. Co. v. Director of Revenue*, 749 S.W.2d 403, 405 (Mo. banc 1988); § 621.193, RSMo. 2000. This court, in essence, adopts the AHC's factual findings. *See Concord Publ'g House v. Director of Revenue*, 916 S.W.2d 186, 189 (Mo. banc 1996).

The AHC's decisions on questions of law are matters for this Court's independent judgment. *La-Z-Boy Chair Co. v. Director of Economic Development*, 983 S.W.2d 523, 524-25 (Mo. banc 1999); *Hewitt Well Drilling & Pump Service, Inc. v. Director of Revenue*, 847 S.W.2d 797, 797 (Mo. banc 1993).

Eddie Bauer had the burden of proof before the AHC. *See* § 621.050.2, RSMo 2000.

Introduction

In *General Motors Corp. v. Director of Revenue*, 981 S.W. 2d 561 (Mo. banc 1998), this court held unconstitutional Missouri's limitation in § 143.431.3(1)[1] on the ability of some corporations to calculate corporate income taxes and file income tax returns as an affiliated group. In this appeal and *Boise Cascade Corp. v. Director of Revenue*, No. SC83869, being briefed and argued simultaneously, parent corporations and their subsidiaries seek refunds based on that decision, ignoring key procedural distinctions between their cases and *General Motors.* General Motors, the parent corporation, filed a composite return at the outset and successfully challenged the Director's assessment of taxes calculated as if the affiliates had filed separately. Eddie Bauer and Boise Cascade could have taken that approach, but decided not to. Instead, the subsidiaries filed separate returns and paid taxes separately. The question is whether they nonetheless can retroactively obtain the benefit of the *General Motors* decision.

The law regarding such retroactive relief was established in a series of U.S. Supreme Court cases involving state taxation statutes that had been declared unconstitutional: *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); *Harper v. Virginia Department of Revenue*, 509 U.S. 86 (1993); *Reich v. Collins*, 513 U.S. 106 (1994); and *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. 442

[1] All citations to Missouri statutes are to RSMo. 2000.

(1998). The key to the analysis comes from *McKesson*. There the Court observed that its precedents had already

> establish[ed] that if a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

496 U.S. at 22. A state is free to offer predeprivation due process, and thus to preclude later suits:

> The State may choose to provide a form of "predeprivation process," for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State.

Id. at 38. If the state does not provide predeprivation process, instead relegating a taxpayers to a refund process, in that process

> the State must provide taxpayers not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy" . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

Id. at 39 (footnote omitted), quoting *Atchison, T. & S. R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912). *See also* 496 U.S. at 51.

As discussed below, Missouri law provided Spiegel and its affiliates, including appellant Eddie Bauer, both pre- and postdeprivation remedies. They failed to take advantage of those remedies, and are thus not entitled to relief on appeal.

I.

The Administrative Hearing Commission did not err in denying Eddie Bauer's refund claim because the decision was authorized by law and supported by competent and substantial evidence in that under § 143.631 Spiegel, Inc. and its affiliates, including Eddie Bauer, had a constitutionally adequate pre-deprivation remedy for challenging the constitutionality of § 143.413.3(1). [Responds to Point I of Appellant's Brief.]

Under *McKesson*, Missouri could meet its due process obligations by providing taxpayers with a predeprivation process:

> The State may choose to provide a form of "predeprivation process," for example, . . . by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State.

496 U.S. at 38. The question under *McKesson* is not whether a Missouri taxpayer takes advantage of an available predeprivation process; it is whether the taxpayer had that option under Missouri law.

Section 143.631 "allow[s] taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State." It permits a taxpayer to calculate taxes itself, then pay only the taxes it calculates that it owes. Under § 143.611, the Director reviews the return and, if she disagrees with the calculation, assesses

a deficiency – *i.e.*, initiates "a tax enforcement proceeding." The taxpayer then has 60 days in which to file a written protest. § 143.631.1. The taxpayer has a right to a hearing before the director. § 143.631.2. The taxpayer may withhold payment of the assessed taxes until there is a final determination as to the protest.[2]

Eddie Bauer argues that § 143.631 does not meet the requirements of *McKesson* because "Eddie Bauer would be penalized for choosing that alternative." App. Br. at 19. To claim it would be "penalized," Eddie Bauer points to the authorization for "additions" in § 143.751.1.[3] But that argument fails to consider precedent that clarifies the scope of the Director's authority to impose such additions – precedent that existed before the Spiegel Group made the decision to have only Eddie Bauer file a Missouri return.

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[2] The statute permits, but does not require, the taxpayer to cut off the accrual of interest by making a deposit in the amount of the assessed taxes. § 143.631.3.

[3] Eddie Bauer does not complain about the provision for the payment of interest that is required by § 143.731.1. The omission is well-considered, for under Missouri law, interest is a neutral factor. Just as a taxpayer must pay interest on the amount of an underpayment, the Director must pay interest on the amount of an overpayment. *See* § 143.811.1. In both instances, the interest is paid at the prevailing prime rate. § 32.065.2. Interest is thus not a penalty, but merely a means of ensuring that neither the state nor the taxpayer benefits or suffers from delay in payment.

As Eddie Bauer recognizes, App. Br. at 19, § 143.751.1 does not impose additions in every instance where the Director calculates a higher tax owed. Rather, it provides for additions to taxes only when "any part of a deficiency is due to negligence or intentional disregard of rules or regulations." Since well before any of the taxes at issue here were due, it has been clear that such provisions are to be construed to sanction additions to tax only where "the taxpayers could not have had a good faith belief that they were not subject to tax." *Hewitt Well Drilling & Pump Serv., Inc. v. Director of Revenue*, 847 S.W. 2d 795, 799 (Mo. banc 1993). Such a narrow reading could hardly have been a surprise; this court observed that it was mandated by the already "well-settled rule that taxing statutes, especially those which impose penalties, are to be strictly construed against the taxing authority and in favor of the taxpayer." *Id*. at 799, citing *Travelhost of Ozark Mountain Country v. Director Of Revenue*, 785 S.W.2d 541, 546 (Mo. banc 1990). *See also Conagra Poultry Co. v. Director of Revenue*, 862 S.W. 2d 915, 918 (Mo. banc 1993). Eddie Bauer assumes that it would be required to pay additions, had it availed itself of the § 143.631 procedure and advanced the argument General Motors made, without addressing those issues.

The assumption that the Director would have successfully imposed additions is made more unlikely by the interposition of the Supreme Court's decision in *Kraft General Foods, Inc. v. Iowa Dept. of Revenue*, 505 U.S. 71 (1992). As is apparent from *General Motors*, the underpinnings of the Missouri law had been removed by that 1992 decision – years before Eddie Bauer paid the taxes at issue here.

Given the demand that the provision for additions found in § 143.751(1) must be construed against the Director, Eddie Bauer and Spiegel should not be permitted to merely assume that the Director would have successfully imposed penalties on the theory that they "intentional[ly] disregard[ed]" any Missouri rule or regulation. In fact, Spiegel could have used use the protest mechanism provided in § 143.631, as did General Motors. That Spiegel chose not to use it does not now give it a constitutional claim.

II.

The Administrative Hearing Commission did not err in denying Eddie Bauer's claims for refund because that decision is authorized by law and supported by competent evidence in the record in that in § 143.801.1, Missouri provided appellant an adequate post-deprivation remedy. [Responds to portions of Points II and IV and to Point III of Appellant's Brief.]

As an alternative to a predeprivation remedy, in the tax context *McKesson* permits a state to provide a postdeprivation remedy, *i.e.*, a means of contesting the validity of the tax after payment. Such a remedy must give taxpayers

> a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy" . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

496 U.S. at 39 (footnote omitted), quoting *Atchison, T. & S. R. Co. v. O'Connor*, 223 U.S. at 285. Missouri provides such a means of contesting tax liability in its refund statute, § 143.801.1. Like the predeprivation procedure discussed above, this approach was available to Spiegel, but Spiegel did not properly use it.

Section 143.801.1 permits a taxpayer to make a "claim for credit or refund of an overpayment." Such a claim "shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later." *Id.* Here, Eddie Bauer did not file such a claim. Rather, "Spiegel Group – a different business entity [that had never filed an original return] – purported to file 'amended' returns." AHC decision, R. 198-211. Spiegel filed what purported to be an "amended return" (the formal means of seeking refunds). As pointed out, Spiegel "was not a Missouri taxpayer *at all*, for the tax years at issue." *Id.* Eddie Bauer does not dispute that point.

With regard to postdeprivation relief, the existence of the limitation in § 143.431.3(1) put Spiegel in a difficult position – but not an impossible one. At the time it was calculating the taxes due from itself and its affiliates for the tax years at issue, Spiegel had three options. Two are discussed above. It could do as it did, *i.e.*, to have only three of its affiliates file returns, thus making them, but not the parent, taxpayers for purposes of the refund statute. And it could follow the course charted by General Motors, *i.e.*, to file a consolidated return and contest the validity of the limitation this court struck down in *General Motors*.

But if Spiegel had a real fear of defeat, and thus of the imposition of additions to the tax if it chose a predeprivation route, Speigel had a postdeprivation option: to file returns and pay taxes *both* for its subsidiary and for the group, then have the subsidiary seek a refund. That would have made Spiegel itself a taxpayer, entitled to a full refund if the limitation in § 143.431.3(1) were upheld. Eddie Bauer, too, would have been a taxpayer, entitled to full refunds if the limitation was held to be unconstitutional.[4]

Under *McKesson*, and assuming, again, that its predeprivation remedy is coercive, Missouri merely has to make such a postdeprivation refund remedy available. The state can impose requirements and restrictions on the postdeprivation or refund remedy, so long as the scheme permits "meaningful" relief, *i.e.*, a full refund of the amount paid pursuant to the unconstitutional statute. One simple, obvious limit: refunds are available only to those who actually and timely pay taxes, *i.e.*, to taxpayers – not to their agents or affiliates. That Spiegel for whatever reason ignored that limitation and declined the opportunity to file in a way that would permit it to obtain a full refund of any overpayment does not create a constitutional problem.

Eddie Bauer and Spiegel attempt to avoid that conclusion by explaining that "the very purpose of allowing corporations to file a consolidated return is to permit corporate affiliates to be treated as if they were one corporation." App. Br. at 29. But that begs the question. That corporations can file a consolidated return does not make them one

[4] Again, as discussed in note 3, *supra*, the refunds would have come with interest.

corporation. *If* they file together, they are a single "taxpayer"; but if they file separately, they retain their individual identity as taxpayers. The point made in *General Motors* is that they *can be* a single taxpayer. They must still make an election – which General Motors did, but Spiegel did not.

But again, Spiegel's ability to obtain postdeprivation relief was merely made more difficult by the presence of the problematic language in § 143.431.3(1). That the company chose not to take the available dual-filing option was its own choice – one that does not render unconstitutional Missouri's decision to grant refunds only to taxpayers.

III.

The Administrative Hearing Commission did not err in denying Eddie Bauer's claims for refund because that decision is authorized by law and supported by competent evidence in the record in that Missouri did not withdraw any post-deprivation remedy. [Responds to Point II of Appellant's Brief.]

Eddie Bauer argues separately that Missouri withdrew its postdeprivation process – the refund mechanism – contrary to *North Supply Co. v. Director of Revenue*, 29 S.W. 3d 378 (Mo. banc 2000), and the U.S. Supreme Court cases cited therein. When it chose not to use the predeprivation mechanism provided in § 143.631.1, Spiegel expected to be able to use the postdeprivation mechanism in § 143.801.1. Missouri could not close that door; it could not "declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich*, 513 U.S. at 108. But in contrast to Georgia, Missouri did not close the

door. It was open then, and is open now, to refund requests from taxpayers who have paid more than the law can constitutionally require. The problem remains, as discussed above, that Spiegel was not a taxpayer.

The problem in *Reich* arose because, on its face, the Georgia law permitted a taxpayer to pay a disputed amount and then seek a refund. *See* 513 U.S. at 111. In fact, looking at that law, "no reasonable taxpayer would have thought that [the predeprivation remedies] represented, in light of the apparent applicability of the refund statute, the *exclusive* remedy for unlawful taxes." *Id*. (emphasis in original). Georgia was barred from holding out that option to taxpayers, but then "declar[ing], after Reich and others paid the disputed taxes, that no remedy exists." *Id*.

By contrast, not only has Missouri provided other remedies, as discussed above, it has done nothing to mislead taxpayers nor to change the rules for refunds. When Eddie Bauer filed its 1995, 1996, and 1997 returns, refunds were available only to taxpayers, just as they are today. Perhaps Spiegel realized too late that it could not ignore both the corporate form it chose to use and the nature of the returns chose to file. But neither *Reich* nor any other precedent Eddie Bauer cites supports the premise that a company's failure to comprehend the obvious meaning of "taxpayer" can justify a post-hoc judicial declaration that refunds are available to a company that could have filed returns adequate to qualify for a refund, but chose not to.

IV.

The Administrative Hearing Commission did not err in denying Eddie Bauer's claims for refund because that decision is authorized by law and supported by competent evidence in the record in that if appellant had no adequate remedy at law, it was entitled to sue for declaratory and injunctive relief prior to paying the taxes in dispute. [Responds to a portion of Point II of Appellant's Brief.]

As discussed above in Point I, in § 143.631 Missouri provided Eddie Bauer and Spiegel a constitutionally adequate predeprivation process. But such a statutory process is not the only approach deemed constitutionally sufficient in *McKesson*. A state may also permit taxpayers to contest the validity of taxes "by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment." 496 U.S. at 38. Such suits are allowed in Missouri in circumstances that may be present here – depending on the answers to the questions addressed above.

This court has heard suits seeking declaratory and injunctive relief, alleging the unconstitutionality of a statute and seeking to enjoin the state from collecting the illegal tax. *E.g.*, *Associated Indus. of Mo. v. Director of Revenue*, 857 S.W. 2d 182 (Mo. banc 1993), *reversed on other grounds*, 511 U.S. 641 (1994). Nonetheless, suits against the state to enjoin the collection of taxes are often barred. *See, e.g.*, *Buck v. Legett*, 813 S.W. 2d 872, 875 (Mo. banc 1991). That is the result not of some statutory or constitutional statement, but because declaratory and injunctive relief are not available when there is an adequate statutory remedy. And for disputes over the legality of taxes, there is usually an adequate statutory remedy. *See, e.g., id.*; *Westglen Village Assoc. v. Leachman*, 654 S.W.

2d 897, 899-900 (Mo. banc 1983); *B&D Invest. Co. v. Schneider*, 646 S.W. 2d 759, 763 (Mo. banc 1983); *Cupples-Hesse Corp. v. Bannister*, 322 S.W. 2d 817, 821 (Mo. 1959).

Whether a suit for injunctive relief was available to Spiegel and Eddie Bauer is dependent on the answers the court gives to the questions posed above. Eddie Bauer claims that its predeprivation remedy through § 143.631 was inadequate. Thus it would not bar injunctive relief. Spiegel is barred from a postdeprivation refund remedy because Spiegel was not a taxpayer. Were the dual-payment option discussed in Point II above then not available, Spiegel would have lacked an adequate remedy at law – and thus been eligible to seek declaratory and injunctive relief. Under *McKesson*, that would have been constitutionally sufficient.

V.

The Administrative Hearing Commission did not err in denying Eddie Bauer's claim for refund for 1995 because that claim was not timely under § 143.801.1 in that it was filed more than three years after the original return. [Responds to a portion of Point V of Appellant's Brief.]

Because it was irrelevant, given the AHC's broader holdings, the AHC suggested but did not hold that Eddie Bauer's claim for a refund of 1995 taxes was not timely filed. In its brief, Eddie Bauer in essence concedes that the claim was filed more than "three years

from the time the return was filed," § 143.801.1 (*see* App. Br. at 31), but relies on a procedural and a legal argument to avoid what the plain language of the statute would make obvious.

As to procedure, Eddie Bauer is correct that the AHC did not make a finding of fact sufficient to determine whether the refund request was timely filed. The matter thus should not be the basis for a decision by this court.

Should the court reach it, however, it should not accept Eddie Bauer's characterization of *Hamacher v. Director of Revenue,* 779 S.W. 2d 565 (Mo. banc 1989). In *Hamacher*, the court imported language from federal law. It in effect changed the language and effect of the limitation in § 143.801.1, reading "within three years from the time the return was filed" to mean within three years from the date on which the return was statutorily due. As the court recognized, the opposite conclusion would penalize taxpayers who voluntarily file before the April 15 deadline.

In citing *Hamacher*, Eddie Bauer fails to address a notable distinction between that case and its own. As Eddie Bauer implicitly concedes, App. Br. 31, it did not file its return early. Instead, it filed late. That was permissible; it had obtained an extension. But that dooms Eddie Bauer's invocation of *Hamacher*.

The language this court imported from the federal statute, 26 U.S.C. § 6513, does not permit *Hamacher* to cover Eddie Bauer. The last sentence of the federal law expressly precludes that premise: "For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined *without regard to any extension of time*

granted the taxpayer and without regard to any election to pay the tax in installments." (Emphasis added.) Were it to become a legitimate question in this case, Eddie Bauer could not rely on *Hamacher*, and, in turn, 26 U.S.C. § 6513, to make timely the "amended" 1995 return filed more than three years the return that Spiegel sought to replace.

CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission should be affirmed and the request for a refund of taxes paid by Eddie Bauer should be denied.

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
Missouri Bar No. 45631
Supreme Court Building
207 West High Street
Jefferson City, MO 65102
(573) 751-1800
(573) 751-0774 (facsimile)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief were mailed, postage prepaid, via United States mail, on this 30th day of November, 2001, to:

Janette M. Lohman
Michael R. Annis
Eeric G. Enlow
Blackwell Sanders Peper Martin LLC
720 Olive Street, 24th Floor
St. Louis, MO 63101

Marilyn A. Wethekam
Fred O. Marcus
Brian L. Browdy

Horwood Marcus & Berk Chartered
180 N. LaSalle Street, Suite 3700
Chicago, Illinois 60601

_____
James R. Layton

Certification of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 30th day of November, 2001, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Janette M. Lohman
Michael R. Annis
Eeric G. Enlow
Blackwell Sanders Peper Martin LLC
720 Olive Street, 24th Floor
St. Louis, MO 63101

Marilyn A. Wethekam
Fred O. Marcus
Brian L. Browdy
Horwood Marcus & Berk Chartered
180 N. LaSalle Street, Suite 3700
Chicago, Illinois 60601

The undersigned certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 5, 296 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

_____

James R. Layton